

STATEMENT BY ROBERT E. HIRSHON, PRESIDENT,
THE AMERICAN BAR ASSOCIATION
TO THE COMMISSION ON OCEAN POLICY

Washington, D.C., November 13, 2001

The American Bar Association appreciates the opportunity to appear before this Commission. As Admiral Watkins has noted, United States interests in the oceans are many and ever changing, particularly so in the thirty years since the last such comprehensive review of U.S. oceans interests. We welcome the decision to create this Commission to undertake such a review and to make recommendations for a national oceans policy that will best serve our interests in long-term stability of rules related to the uses of the oceans. We understand that the Commission's brief includes important issues of coastal zone management and internal waters. However, no view of U.S. ocean interests can be considered comprehensive that does not deal with the oceans beyond our shores and the rules by which all nations may accommodate their differing interests beyond the reach of national laws.

Such a virtually universal framework of law does in fact exist in the form of the Law of the Sea Convention now awaiting the advice and consent of the Senate to ratification so that the United States may become a party to it. The American Bar Association therefore recommends that this Commission support early action by the Senate to approve this Convention, as a necessary precursor to further measures that it may later recommend with respect to the future stewardship of our common oceans. We would like to comment briefly on the importance of this Convention and address specifically the issue of the consequences of failure of the United States to ratify a Convention to which 137 states are now party, and which has thus achieved the near universality that was an important objective of the United States in negotiating this agreement over a period of twenty years and six administrations.

In August 1994 the ABA approved a resolution recommending that the United States become party to the 1982 United Nations Convention on the Law of the Sea, and to the Agreement relating to the Implementation of Part XI of that Convention, which had been adopted and signed by the United States just the month before, in July 1994. These two documents were submitted to the Senate in November of 1994, where they have yet to be acted upon.

Members of this Commission who are familiar with the history of the negotiations of the Law of the Sea Convention will recall that the United States did not sign the Convention of 1982 because of concerns relating to certain deep seabed mining provisions of Part XI that did not adequately protect possible U.S. future interests. With the exception of these provisions there has been broad agreement that the Convention greatly served the interests of the United States in providing a stable legal framework, a framework that, among other things, preserved customary freedoms of navigation vital to ocean powers such as the United States for both strategic and commercial reasons.

Because of the importance the ABA attaches to such a rule of law in the oceans, the ABA early supported efforts to find ways to fix the controversial provisions of the deep seabed mining regime and, in 1990, recommended that a new effort be made to determine what changes and clarifications would make Part XI acceptable to the United States and to its negotiating partners. Such an effort was undertaken by the first the Bush administration and ultimately resulted in the 1994 Agreement. At that time ABA thoroughly reviewed these new provisions and concluded that the objections set forth by the United States in 1982 had been fully satisfied by this new Agreement, which, in effect, substitutes for any differing provisions in the original text. The ABA then adopted the resolution, noted above, recommending that the United States become a party to the Convention. The accompanying report of the Section of International Law and Practice sets forth the reasons why we concluded that the Agreement and the Convention protect U.S. interests, and we are submitting a copy of that report with this statement for those who may be interested in our conclusions on that point. As a result of the adoption of the 1994 agreement, many of our major allies, including the

United Kingdom, France, Germany, Japan, and others who had earlier signed, but had not yet become a party to the Convention, then did so.

Some now suggest that since this Convention has been ratified by 137 states, including both friends and adversaries, it does not matter whether or not the U.S. is formally a party to the it. (It is true that there is a long list of treaties which the United States has signed, abides by, supports, but has not ratified.) In the case of the Law of the Sea Convention the answer to the question of whether formal acceptance matters is both specific, as to activities and institutions created by the Convention, and general, with respect to the nature of American leadership in promoting the rule of law in an increasingly lawless world.

As to specifics, the Convention codifies rules with respect to freedom of navigation and overflight that were not necessarily universally recognized as customary international law. While the United States continues where necessary to assert rights of freedom of navigation, protests of violations or encroachments based upon universally understood and accepted provisions in the Convention are obviously more precise. The Convention also defines limits of, and the resource specific nature of, coastal state jurisdiction in an economic zone beyond the 12 mile territorial sea. The Convention created a Law of the Sea Tribunal but, absent ratification, the United States cannot offer a judicial candidate. Similarly the United States is ineligible to put forth a candidate for membership on the Outer Continental Shelf Commission which is considering and making recommendations on how states should define the boundaries of the outer continental shelf in places where the shelf extends beyond 200 miles. As oil exploitation had become possible in these distant areas, certainty of jurisdiction is essential to stability. In short the Convention is living up to its original intended function as a framework within which rules governing new and peaceful uses of the oceans might be developed.

More important than specifics, however, is the Convention's role as the foundation of public order in the oceans. In that sense the treaty is an extraordinary achievement in the annals of global rule making. However universally accepted the Convention's provisions may now appear they

will surely erode over time if the United States fails to exercise the kind of continuing leadership and participation which led to this extraordinary achievement in the first place. There does not now appear to be any rationale which would support our continuing nonparticipation in an agreement that so effectively stemmed the rising tide of claims of national jurisdiction in the oceans, and that will continue to serve our interests as long as the United States sits astride two great oceans.

As a first and vital step in creating a comprehensive oceans policy, the American Bar Association therefore recommends that this Commission support early action in the Senate to approve the Convention. Thank you.